

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**FEDERAL TRADE
COMMISSION**

VS.

ZAAPPAAZ, LLC, ET AL.

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Civil Action No. 4:20-CV-2717

**DEFENDANTS' FIRST SUPPLEMENT TO THEIR MOTION TO
STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,
MOTION TO STRIKE CERTAIN SUMMARY JUDGMENT
EVIDENCE, AND OBJECTIONS TO PLAINTIFF'S SUMMARY
JUDGMENT EVIDENCE (DKT. NO. 102)**

Defendants file this Supplement and respectfully show as follows:

I.

The FTC apparently believes the Federal Rules of Civil Procedure and the Federal Rules of Evidence are mere suggestions a federal agency may abide by or not abide by and are not directives the FTC must follow.

In trying to avoid Court intervention, Defendants' counsel conferenced by phone on December 1st with Plaintiff's counsel regarding Plaintiff's unfiled evidence. Defendants offered the FTC a path to getting its evidence properly on file, so long as the FTC would give Defendants

14 days after it filed its evidence to respond to the FTC's Motion. In response, the FTC declined and said it had emailed the exhibits to Defendants' counsel, but Defendants' counsel never downloaded them.¹

Defendants' counsel searched his email and found a secure message opposing counsel sent on October 26th with a link to purported exhibits. Ex. 1. The undersigned did not see that email until Plaintiff's counsel made the comment.

Service by email is generally ineffective in federal courts. *See* FED. R. CIV. P. 5(b). Parties may, however, agree in writing to service by email. *See id.* at R. 5(b)(2)(F). In apparent recognition of Rule 5, Plaintiff's counsel asked Defendants' counsel to consent to service by email. Ex. 2. Defendants' counsel stipulated, however, that service by email would only be effective if certain persons were copied:

¹ At the time, the undersigned said everything had been downloaded. After searching email, the undersigned realized the exhibits had not been downloaded.

From: Mike Blanchard <mikeblanchard@Butchboydlawfirm.com>
Sent: Monday, October 19, 2020 4:13 PM
To: Schaefer, Michelle <mschaefer@ftc.gov>; Collesano, Anne <acollesano@ftc.gov>
Cc: Butch Boyd <butchboyd@butchboydlawfirm.com>; Jeremy Stone <jeremystone@Butchboydlawfirm.com>; LeRae Karn <LeraeKarn@Butchboydlawfirm.com>; Sandy Murray <sandymurray@Butchboydlawfirm.com>
Subject: RE: Zaappaaz

Michelle, contingent on your agreement to service via email, we agree to such service so long as all of the following are included on FTC service emails:

butchboyd@butchboydlawfirm.com
jeremystone@butchboydlawfirm.com
mikeblanchard@butchboydlawfirm.com
leraekarn@butchboydlawfirm.com
sandymurray@butchboydlawfirm.com

Unless otherwise advised, we will include the following on all of Defendants' service emails:

mschaefer@ftc.gov
acollesano@ftc.gov

Please reply in the affirmative if you agree, and please include in your reply any additional persons we should include on service emails.

Ex. 2. Counsel for the FTC agreed:

Mike Blanchard

From: Schaefer, Michelle <mschaefer@ftc.gov>
Sent: Monday, October 19, 2020 3:27 PM
To: Mike Blanchard; Collesano, Anne
Cc: Butch Boyd; Jeremy Stone; LeRae Karn; Sandy Murray
Subject: RE: Zaappaaz

Thank you. We agree. For now, you only need to serve documents on me and Anne. If that changes, we will let you know.

Thank you,

Michelle

As indicated in Exhibit 1, the exhibits were not emailed to, among other persons, the lead attorney on this case (Butch Boyd). As such, the FTC cannot argue it properly *served* its summary judgment evidence,

much less *filed* the evidence.

II.

Defendants respectfully ask the Court to strike the FTC's Motion. In the alternative, Defendants ask the Court to strike all unserved and unfiled exhibits, and any references to those exhibits, from the record.

Respectfully submitted,

FOR DEFENDANTS

/s/ Michael J. Blanchard
State Bar No 24036231

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CERTIFICATE OF SERVICE

I certify that that on December 1, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF, served on users registered to receive electronic notice in the captioned case via transmission of Notices of Electronic Filing generated by CM/ECF, and via email on the counsel listed below.

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/s Michael J. Blanchard
Michael J. Blanchard